aimed to prevent any system of rates whereby one group of the public should profit at the expense of another part of the public; as is said in the *North Dakota* case: "Certainly, it could not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low. This would be but arbitrary action." Another question, which however will not be answered, is whether such a procedure as was followed in these cases, is defensible on a cost theory of rates, on a value of service theory of rates, or on a theory of rates combining both of these factors? Furthermore, to what extent does it take sufficient account of the interrelation between the specific rates in an entire rate schedule and such entire schedule? The courts will no doubt constantly run into questions of this type in their efforts to define the exact limits of these doctrines, especially that announced in the *North Dakota* case. Space forbids going into an historical discussion of the development of the rate question suggested by these recent cases. In conclusion it may be merely stated that it is an attempt to determine the meaning of the general test for confiscation in respect to the various details of the general rate problem. Further developments in this direction are inevitable. H. R.

AUTHORITY OF PRESIDENT TO WITHDRAW LANDS FROM ENTRY.—Whether the act of the President in withdrawing lands from entry is constitutional has been for some years a question upon which authorities on Constitutional Law have been at variance, and regarding which the different administrations have not wholly agreed. This dispute has been recently settled by the Supreme Court in *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 35 Sup. Ct. 309, where the majority of that court upheld the order of President Taft of September 27, 1909, withdrawing from entry over 3,000,000 acres of oil land in California and Wyoming. The dissenting opinion by Mr. Justice DAY (with whom concurred Mr. Justice MCKENNA, and Mr. Justice VAN DEVANTER), certainly detracts from the weight of this decision.

The prevailing opinion, admitting that Congress has exclusive control of public lands, proceeds upon the theory that by long acquiescence it has impliedly delegated to the President the power to make withdrawal orders, and that until such implied authority is withdrawn or the act of the President repudiated, the orders thus promulgated have the force and effect of law. But conceding that such long acquiescence would be a just ground for the implication of authority, has there been this tacit consent of Congress? As is pointed out in the dissent, the cases in which the executive power to withdraw lands from entry has been upheld by the courts, other than those under express congressional authority, may be classified under one of two heads: (a) in furtherance of some purpose formerly declared by Congress as one for which the public lands might be used; (b) where the acts of Congress regarding the land are so conflicting as to make it doubtful what the policy was, and the withdrawal is for the purpose of awaiting action by Congress to declare the policy. The case of *Grisar* v. *McDowell*, 6 Wall. 363, much relied upon as in support of the prevailing opinion, will on close analysis be seen to range itself under the first of these two heads. The cases involving

land along the Des Moines River, *Wolcott* v. *Des Moines County,* 5 Wall. 681; *Williams* v. *Baker,* 17 Wall. 144; *Homestead Company* v. *Valley R. R.,* 17 Wall. 153; *Wolsey* v. *Chapman,* 101 U. S. 755; *Litchfield* v. *Webster Co.,* 101 U. S. 775; *Dubuque R. R. Co.* v. *Des Moines Valley R. R. Co.,* 122 U. S. 167; *United States* v. *Navigation Co.,* 142 U. S. 510; *Riley* v. *Willis,* 154 U. S. 578, also relied upon, may all fairly be classed under the second head.

Clearly the principal case is not one falling within the second class. Can it be placed under the first? In order to ascertain this let us look to the purpose of the withdrawal order. It is declared to be "In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain * * *." This order was promulgated on the recommendation of the Director of the Geological Survey, approved by the Secretary of the Interior which recommendation pointed out that the oil supply from these fields was being rapidly exhausted and that in view of the increasing use of oil in the navy it would be well to conserve the supply. So far as appears there had been no action by Congress prior to this order declaring the controlling and disposing of oil deposits to be a purpose for which the public lands might be used, or reserved from entry. So that this case cannot be classified under the first head. True, there have been a great number of orders by the Executive reserving lands from entry, but none have been sustained by the courts, unless within the two classes above enumerated. On the other hand the court has held that such withdrawal does not have the binding force here attributed to it when it contravenes some policy declared by Congress in the disposition of public lands; *Brandos* v. *Ord,* 211 U. S. 11; *Osborn* v. *Froyseth,* 216 U. S. 571; *Southern Pac. R. R.* v. *Bell,* 183 U. S. 675. In the light of their decision, and under the statute in force at the time of this withdrawal order, permitting the entry on their lands (29 Statutes at Large 526) it is difficult to see how as a matter of strict legal logic, the court arrived at the decision; see 13 MICH. LAW REV. 255.

At the time of the withdrawal the President doubted his authority and power to make the order, and for the purpose of giving it effect, asked Congress to ratify his action, President's Message of Jan. 14, 1910. But it is to be noted that although at that session of Congress a statute was passed conferring authority on the Executive to withdraw, in an essentially different manner, lands from entry in the future, the same statute expressly provided that it should not be operative upon lands previously withdrawn; 36 Statutes at Large 847. It is a general rule that refusal to ratify, after a request, destroys any implication of power. *Barden* v. *Northern Pacific R. R. Co.,* 154 U. S. 288, 317; *Durousseau* v. *U. S.,* 6 Cranch, 307, 318; *Eyster* v. *Board of Finance,* 94 U. S. 500, 503. So that here we find an expression by Congress which disaffirms any such implied authority.

There are those who contend that regardless of any grant of power by Congress, express or implied, the President has the inherent power to make such an order as the one here involved, by virtue of the grant of executive power in Art. 2, Sec. 1, of the Constitution. The court refuse to pass upon this question, preferring to dispose of the case upon another ground, viz: that there was the tacit consent of Congress. It is perhaps to be regretted that

the court thus evaded the question instead of settling once and for all a dispute which has become so prominent in late administrations.

The decision is a very desirable one, however, from an economic standpoint, and shows a desire on the part of the court to aid in the efficient administration of government, and, since any attempt to take undue advantage of such authority can be readily checked by affirmative action of Congress, it seems highly advantageous that this administrative power be upheld. The decision cannot be construed as an extension of Executive power, or as sanctioning an encroachment by one of the three great departments upon the powers of another, the separation of which, as is said in *Kilbourn* v. *Thompson,* 103 U. S. 190, "is believed to be one of the chief merits of the American system of written constitutional government." R. B. O'H.

MUTUALITY OF CONTRACTS.—Two recent cases decided in the Supreme Courts of Kentucky and Missouri show very distinctly the uncertainty and dispute attendant upon contracts where the question is one of mutuality of obligation. The essential contract elements in both cases are almost identical, yet the two courts arrived at entirely different conclusions. In the Kentucky case the contract was found by the court to be that defendant agreed to receive and pay for all the ties that plaintiff *could* deliver. *Held,* that contract imposed on the plaintiff the duty of exercising reasonable diligence to procure and deliver all the ties he could. *Ayer & Lord Tie Co.* v. *O. T. O'Bannon & Co.,* (Ky. 1915) 174 S. W. 783. In the Missouri case the plaintiff agreed to furnish as many ties as his time, money and effort would permit up to 200,000, and though not bound to furnish the 200,000, to secure as many as he could using every possible means. *Held,* the contract was void for want of mutuality of obligation. *Hudson* v. *Browning,* (Mo. 1915) 174 S. W. 393.

In the second case the contract would seem to state as part of its terms that the plaintiff should do the very thing which the Kentucky court decided would make the contract of this sort binding, namely to impose the duty of exercising reasonable diligence to perform the contract. If the Kentucky court had undertaken to state specifically what would constitute reasonable diligence they certainly could not have required that a party do more than use "every means at their command, so far as time, money and effort will permit," and yet the Missouri court decides that this is not enough to make this contract mutually binding and enforceable.

A contract to be mutually binding must force an obligation on each party to do or permit to be done something in consideration of the act or the promise of the other; that is, neither party is bound unless both are bound. 7 ENCY. OF LAW, (2nd ed.) 114; PARSONS, CONTRACTS, (9th ed.) 486. The difficulty on the subject does not come from any dispute over the rule but from its application. Just when each party is bound is what causes the difference in decisions. Some courts go on the firm ground that in cases where the contract is for the delivery of a number of articles, as in these cases, unless one party is bound to deliver and the other party is bound to receive